United States Court of Appeals for the
Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing six pages [five printed pages] contain a true copy of the Motion and Order to dispense with printing Original Exhibits in the case of E. S. Cook et al., Constituting the Board of Education of the City of Atlanta, Appellants, versus Samuel L. Davis, Individually and on Behalf of Others Similarly Situated, Appellee, No. 12,727, as the same remains upon the files and records of said United States Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 10th day of May, A. D. 1950.

Oakley F. Dodd,
Clerk, U. S. Court of Appeals for
the Fifth Circuit.

(Seal)

Office - Supreme Court, U. S.
FILED
SEP 29 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. [redacted] 61

SAMUEL L. DAVIS, Individually and on Behalf of Others Similarly Situated,
Petitioner,

v.

E. S. COOK et al., Constituting the Board of Education of the City of Atlanta.

SUPPLEMENTAL REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 808.

SAMUEL L. DAVIS, Individually and on Behalf of Others Similarly Situated,
Petitioner,

v.

E. S. COOK et al., Constituting the Board of Education of the City of Atlanta.

SUPPLEMENTAL REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

This supplemental reply brief opposing the writ of certiorari is filed in answer to the supplemental brief which has just been served upon the Respondents.

While this supplemental brief boldly asserts that there is a direct conflict between the decision by the Court of Appeals for the Fifth Circuit in this case and the decision by the Court of Appeals for the Fourth Circuit in **Carter v. School Board of Arlington County, Virginia, 182 F. 2d 531,** even a casual examination of the two opinions will completely refute this claim. This we will briefly demonstrate.

Carter was a pupil in the Hoffman-Boston High School in Arlington County, Virginia. He applied for permission to take a certain course of study which was not offered by

the school. One of the defenses rather faintly asserted in the trial court was that the intervenor Brevard had not seriously applied for this course, inasmuch as his conversation with the principal was a casual one, and the principal had no opportunity of taking the matter up with the superintendent. The Fourth Circuit, at **182 F. 2d 537**, points out that the refusal was not based upon the casual manner in which it was presented, but it inevitably arose because no course in auto mechanics could be taught in that school, facilities being lacking. Therefore, that case does not present any question of administrative remedy. The school regulations embodied no administrative procedure, and made no provision for an appeal, which had to be exhausted, and a defense of that nature certainly had no substance. But in **Cook v. Davis, 178 F. 2d 595**, an entirely different condition of facts exists. There Davis was employed under a scheme of classification which provided for appointments, appraisement, and appeal, and as the court points out, page 599:

> "Each teacher was mailed a letter and a copy of the Classification Scheme and salaries, and of the procedure for its operation. The letter stated what the teacher's placement was and his salary . . . and it called attention to the provisions for appeal for a different placement."

It was under such facts that the Circuit Court of Appeals for the Fifth Circuit, following the decisions of this Court, held that the administrative remedy should first be exhausted.

The supplemental brief does not deny the other points raised in opposition to the grant of the writ of certiorari, to-wit, that the reviewing court was dissatisfied with the results in the trial court on two additional grounds: (1) that the evidence to sustain the plaintiff's claim was insufficient, and (2) that the decree was vague and indefinite.

In the original petition for writ of certiorari, the claim was boldly made that the appellate court had affirmed the findings of fact by the trial court. We pointed out the error in this claim, and it need not be repeated. Since our opponents do not discuss this phase of the question, it must be assumed that we are correct in our claims. But the decision under review does not leave the question in doubt. We quote from it briefly:

> "The new Superintendent, Miss Jarrell, who with the white and colored principals in the several schools made the placements each year, testifies that Davis made no complaint; and since this suit was pending, she asked him if he was still dissatisfied, and he said he 'thought we were doing the best we could'; and she asked him to come and talk about his salary, but he never did. A few other teachers complained to her, and each complaint was satisfactorily adjusted. No one has ever appealed to the Atlanta Board or the State Board. Neither Davis nor any other witness denies this . . . The Superintendent and the defendants who testified say they are making a sincere, diligent and successful effort to classify all their teachers according to their individual worth as teachers. No teacher but Davis testified, and he makes a very unimpressive case for himself."

Before the Court can find error in the decision below, it must determine that the findings of fact above recited are not supported by the evidence. Aside from the fact that the evidence before the Court is not properly a part of the record from the Circuit Court of Appeals, it presents at most a difference between counsel and the appellate court regarding the evidence, and this Court has invariably refused to grant certiorari where only a conflict of fact is presented.

That the case must go back in any event to the district court appears from the following holding:

> "The decree too is very vague; it could not be of much practical help to the Board. Nor could it be easily enforced, for it only states in general terms a duty which no one disputes, with no specifics at all pointed out." **178 F. 2d 595, at 599.**

The contention, page 3 of the supplemental brief, that in both instances the problem is substantially identical—whether a state may provide better and greater advantages to white persons than it affords to negroes, in similar circumstances, solely because of race and color—is not correct.

The case under review was a class bill asserting discrimination in paying teachers. The Carter case involved the right of two pupils to be instructed in specific subjects.

But the fundamental difference in the two cases is this: In the case at bar the regulations and the law provided specific administrative remedies which were not pursued. In the Carter case, no administrative remedy was available. None was provided by regulation or law.

Neither the trial court nor the Court of Appeals for the Fourth Circuit refers to any provision for an administrative remedy. All the trial judge said was that apparently the request of the pupil that instruction be given him in a particular subject "was never seriously pressed." The question there was not whether the pupil had failed to pursue an administrative remedy available to him whereby he might obtain what he sought, but whether he really wanted or had asked for what he sued to obtain. Manifestly there could be no discrimination against him if he did not want the course.

The present case is altogether different, and it is clearly apparent that there is no conflict between the decision of the Fourth Circuit in the Carter case, and that of the

Fifth Circuit in this case. The contention that there is a conflict is just as untenable as the contention in the original brief of counsel for petitioner, reiterated in the supplemental brief, that the decision in this case conflicts with that of the Ninth Circuit in **Transpacific Air Lines v. Hawaiian Air Lines, 174 F. 2d 63.**

It is contended that had the case at bar been in the Court of Appeals for the Fourth Circuit, the decision would have been different. We need not speculate about what the Fourth Circuit might have done with this case. We must assume that it would have followed the law, as did the Fifth Circuit.

But the question here is not what the Fourth Circuit might have done, but whether the writ of certiorari should be granted. We think it should not, not only because petitioner has wholly failed to comply with the rules of this Court, but because the decision below is right. Furthermore, no novel or unusual question is presented; on the contrary, the principle of non-discrimination asserted by the petitioner is fully recognized and accepted.

Respectfully submitted,

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